APPEAL NO. 022186
FILED OCTOBER 4, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 30, 2002. The hearing officer determined that the appellant/cross-respondent (claimant) is not entitled to supplemental income benefits (SIBs) corresponding to the ninth compensable quarter. On appeal, the claimant contends that this determination is against the great weight and preponderance of the evidence; that it is based upon the application of erroneous legal standards; and that Rule 130.102(d)(4), the applicable rule for determining SIBs eligibility in the present case, is invalid. The respondent/cross-appellant (carrier) conditionally appeals the hearing officer's finding that the claimant's unemployment is a direct result of the compensable injury. In response to the claimant's appeal, the carrier urges affirmance of the non-entitlement determination. The appeal file contains no response to the carrier's conditional appeal.

DECISION

We affirm.

The claimant argued at the hearing that he was entitled to SIBs corresponding to the ninth compensable quarter because he had no ability to work during the corresponding qualifying period. Section 408.142(a) outlines the requirements for SIBs eligibility as follows:

> An employee is entitled to [SIBs] if on the expiration of the impairment income benefit [IIBs] period computed under Section 408.121(a)(1) the employee:
>
> (1) has an impairment rating [IR] of 15 percent or more as determined by this subtitle from the compensable injury;
>
> (2) has not returned to work or has returned to work earning less than 80 percent of the employee's average weekly wage as a direct result of the employee's impairment;
>
> (3) has not elected to commute a portion of the [IIBs] under Section 408.128; and
>
> (4) has attempted in good faith to obtain employment commensurate with the employee's ability to work.

Rule 130.102 provides that an injured employee who has an IR of 15% or greater and who has not commuted any IIBs is entitled to SIBs if, during the qualifying period, the claimant has earned less than 80% of the employee's preinjury wage as a direct

result of the impairment from the compensable injury and has made a good faith effort to obtain employment commensurate with the employee's ability to work. Rule 130.102(d)(4) states that the "good faith" criterion will be met if the employee:

> has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

The hearing officer found that although there was a narrative report in evidence complying with the requirements of Rule 130.102(d)(4), there was also a report prepared by Dr. G, based upon his examination of the claimant during the qualifying period in question, that showed that the claimant had an ability to work. Consequently, the hearing officer determined that the claimant is not entitled to SIBs for the ninth quarter.

The claimant asserts that Rule 130.102(d)(4) is invalid "because it imposes burdens and restrictions inconsistent with or contrary to" Section 408.142(a)(4). The Appeals Panel has previously held that it does not have authority to decide the validity of Commission rules. Texas Workers' Compensation Commission Appeal No. 010724, decided May 17, 2001. Administrative rules are presumed to be valid, that the burden of proving invalidity is on the party asserting invalidity, and that the courts are the proper forum for deciding the validity of agency rules. Texas Workers' Compensation Commission Appeal No. 980673, decided May 18, 1998.

The claimant argues on appeal that Dr. G's report should not have been given consideration because his appointment as a designated doctor was not authorized under Rule 130.110(a). That rule provides in part that, "[t]his section applies only to disputes regarding whether an injured employee whose medical condition prevented the injured employee from returning to work in the prior year has improved sufficiently to allow the injured employee to return to work on or after the second anniversary of the injured employee's initial entitlement to [SIBs]." The preamble to Rule 130.110 states: "[n]ew § 130.110(a) establishes that if a dispute exists regarding whether an injured employee's medical condition has improved sufficiently to allow the injured employee to return to work after the second anniversary of the injured employee's initial entitlement to [SIBs], the Commission, when requested or on its own motion, shall select a designated doctor to resolve the dispute and that the report of the designated doctor has presumptive weight."

The claimant contends that Dr. G's appointment was not authorized because two years had not transpired since the claimant's initial SIBs entitlement. In Texas Workers' Compensation Commission Appeal No. 011564, decided August 21, 2001, the Appeals Panel noted that the report of a designated doctor selected pursuant to Section 408.151 and Rule 130.110 was not entitled to presumptive weight because "the dispute as to whether the claimant's condition had improved sufficiently to allow him to return to work arose prior to the 'second anniversary of the injured employee's initial entitlement to

SIBs.'" Likewise, in the instant case, the claimant's initial entitlement to SIBs was not until late November 2000, so the second anniversary requirement would not have been met. The hearing officer correctly notes that Dr. G's report was not entitled to presumptive weight but, as it was based upon a thorough examination made during the qualifying period, the report was given the same consideration as any another medical record. We perceive no error in the hearing officer having done so. *See* Texas Workers' Compensation Commission Appeal No. 002309-S, decided November 16, 2000.

Having determined that the hearing officer did not err in considering Dr. G's report, albeit not affording it presumptive weight, we next address whether the hearing officer erred in determining that it constituted a record showing that the claimant had had ability to work. Whether another record "shows" an ability to work is a question of fact for the hearing officer to resolve, and his determination is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). We perceive no error in the hearing officer's resolution of the factual issues in this case or in his application of the relevant law.

Regarding the carrier's conditional appeal, we affirm the hearing officer's direct result determination. The reports of the claimant's treating doctor support the hearing officer's direct result determination in this case. We also affirm the hearing officer's determination regarding the narrative in this case as it is supported by the record and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

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Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

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Philip F. O'Neill
Appeals Judge